

United States Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a corporation,

Plaintiff in Error,

vs.

SARAH J. IRVING,

Defendant in Error.

ANSWER BRIEF.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

JAN 31 1904

DANSON, WILLIAMS & DANSON,

Attorneys for Defendant in Error.

Spokane, Washington.

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ARGUMENT.

The defendant in error brought action to recover damages for personal injuries received in a wreck while a passenger on the plaintiff in error's train. Defendant in error placed in evidence the fact that she had been accepted as a passenger; that the car in which she was traveling was derailed; and that the derailment resulted in injuries, the nature and extent of which are not now called into question. (Trans., 28-31.) Plaintiff in error contended and adduced evidence for the purpose of showing that the derailment was not due to negligence on its part but was caused by the malicious acts of unknown persons. The court submitted to the jury the evidence relied upon as a defense, and they determined that the evidence did not negative the inference of negligence arising from proof of the derailment and the resulting injury to the defendant in error.

Res Ipsa Loquitur.

The facts proven by defendant in error made a case of negligence on the part of the plaintiff in error under the doctrine of *res ipsa loquitur*, the thing speaks for itself, placing upon the carrier the burden of proving itself free from negligence:

The New Jersey Railroad & Transportation Co. v. Pollard, 89 U. S., 341; 22 L. Ed., 877;

- Stokes v. Saltonstall*, 38 U. S., 181; 10 L. Ed., 115;
Albion Lbr. Co. v. De Nobra (9th Cir.), 72 Fed., 739, 741;
Hopper v. Denver & R. G. R. Co. (8th Cir.), 155 Fed., 273, 278;
Patterson v. Jacksonville Traction Co. (5th Cir.), 213 Fed., 289, 291.

The principal question presented for determination is whether the facts which give rise to an inference of negligence according to the *res ipsa loquitur* doctrine are entitled to weight as evidence of negligence, or do they serve only to change the order of proof. If they constitute evidence of negligence, evidence adduced by the defendant for the purpose of negating negligence creates but a conflict of evidence. If those facts serve only to put the defendant to its proof, as plaintiff in error contends, then any showing, however weak, which would be entitled to consideration as tending to show defendant's freedom from negligence would overcome the inference of negligence arising out of the derailment and injury to a passenger, and there would be no conflict of evidence, in the absence of a further showing by the injured passenger.

Before reviewing the decisions, the nature and function of the *res ipsa loquitur* doctrine should be considered: The doctrine grew out of the principle that one who has within his control the means

of proof should be required to produce it. The one who has the management and control of the instrumentality which causes the injury has it within his power in most cases to produce or withhold the evidence showing negligence or freedom from it, therefore, where the injury is received under circumstances that do not ordinarily exist in the absence of negligence on his part, the defendant is required to show freedom from negligence. The doctrine is especially applicable to derailment cases. A passenger is not in a position to do more than prove the occurrence; the carrier alone has access to the evidence that will show whether or not the occurrence was the result of negligence as borne witness to by the occurrence itself. If it sees fit to withhold evidence of its negligence, the passenger is helpless. If bound to give direct evidence of the negligent acts which caused the derailment, the plaintiff would be at the defendant's mercy and a recovery could never be had. If the evidence which the defendant sees fit to produce—always indicating freedom from negligence—must be accepted as all of the evidentiary facts and as true unless rebutted, the plaintiff would be just as much at the defendant's mercy as if the defendant were not required to produce any evidence; the passenger is in no better position to rebut the showing which the carrier makes than in the first place to offer proof other than the occurrence and the injury. The *res ipsa loquitor* doctrine would be without practical effect,

if the showing of injury by a derailment while a passenger on the defendant's train, were entitled to no weight as against the carrier's evidence—evidence confined to that which is self-serving.

Defendant in error contends that a derailment of a train upon which passengers are carried is of itself such *evidence* of negligence that it gives rise to a conflict when controverted, and, that it is for the jury to determine whether or not the carrier's evidence counterbalances it. The plaintiff in error does not contend and could not successfully maintain that the court may direct a verdict where there is a conflict in the evidence. It assumes that there is no conflict; that the evidence adduced by it stands uncontroverted. This is due to a misconception of the effect of defendant in error's evidence; to the incorrect assumption that it gave rise to a bare presumption which vanished in the presence of evidence.

United States Supreme Court decisions are controlling:

“Nevertheless it is contended by the learned counsel for the plaintiff, when the occurrences connected with the injury were proved, that, and upon the doctrine *res ipsa loquitor*, such proof, *per se*, showed that the defendant had been guilty of negligence, and that, under the doctrine of the Kentucky Court of Appeals announced in the case of *Morgan v. C. & O. Ry. Co.*, 105 S. W. 961, 32 Ky. Law Rep. 330, 15 L. R. A. (N. S.) 790, the onus at once shifted to the defendant, which, in order to exonerate itself, must show that it had used due care to inspect and keep in good order

the ladder in question. If we assume that that case upholds the doctrine indicated, nevertheless, as this is a question of general jurisprudence and not of local law merely, we must follow the rules, if any, laid down for us by the Supreme Court or by the Circuit Court of Appeals of this circuit.” (532.)

Patton v. Illinois Cent. R. Co (Ky.), 179 Fed., 530.

See also:

11 *Cyc.*, 890.

In *Sweeney v. Erving*, 228 U. S., 233, 240; 57 L. Ed., 815, 819, the court held that an occurrence which calls for the application of the *res ipsa loquitor* doctrine is of itself “circumstantial evidence of negligence” and “is evidence to be weighed” by the jury.

The *Sweeney* case establishes that facts which warrant the application of the *res ipsa loquitor* doctrine are evidentiary. While the court was not called upon to decide whether or not they would create a conflict when opposed to evidence adduced by the defendant, it necessarily follows that the defendant’s evidence could do nothing more than create a conflict of evidence, the determination of which would be for a jury. Earlier decisions as well as logic would have called for such a conclusion had the question been presented:

“The law is that the plaintiff must show negligence in the defendant. This is done

prima facie by showing, if the plaintiff be a passenger, that the accident occurred. *If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case.* When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances." (463. Italics ours.)

Gleeson v. Virginia Midland Ry. Co., 140 U. S., 435, 444; 35 L. Ed., 458.

Although some of the state courts have rendered erroneous decisions, due to a mistaken notion that the occurrence gives rise to a bare presumption which cannot oppose evidence, and to the failure to call to mind the function of the doctrine of *res ipsa loquitur*, the great weight of authority is in harmony with the law as announced in the United States Supreme Court decisions:

"The jury was not bound to take the statement of defendant's witness as true that the defect in the pole could not have been discovered by inspection. Were it otherwise, the injured party would usually be at the disadvantage of being concluded by the one-sided evidence of the carrier as to matters exclusively within the knowledge of its employe's." (681.)

Donovan v. Kansas City Elevated Ry. Co.
(Mo.), 138 S. W., 679.

See also:

Turner v. So. Power Co. (N. C.), 69 S. E.,
767, 770.

“The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter they were bound to apply the rule that the burden of proof was upon the plaintiff.” (753.)

Kay v. Metropolitan St. Ry. Co. (N. Y.),
57 N. E., 751.

“The usual and ordinary evidence in explanation available is in possession of defendants, peculiarly so in a case of this nature; this last condition being referred to by Connor, J., in *Womble v. Grocery Co.*, *supra*, as the basis of the maxim, and in such case as stated the question of defendant’s responsibility must be referred to the jury: not, as shown by these authorities cited, under any presumption changing the burden of the issue, but as a cause in which evidence has been offered, from which negligence on the part of the defendant may be inferred. Speaking to this special feature of the doctrine in *Womble’s* case, it is said: ‘The principle of *res ipsa loquitur* in such cases carries the question of negligence to the jury, not relieving the plaintiff of the burden of proof, and not, we think, raising any presumption in her favor, but simply entitling the jury, in view of all the circumstances and conditions, as shown by plaintiff’s evidence, to infer negligence and say whether upon all the evidence, the plaintiff has sus-

tained his allegations.' Where the application of the doctrine we are discussing is properly called for, its effect and operation are not displaced or removed because there is testimony offered which if accepted by the jury, would exonerate the defendant, for in all such cases the credibility of the evidence relevant to the inquiry is for the jury; they may accept or reject it." (770.)

Turner v. So. Power Co. (N. C.), 69 S. E., 767.

"Nor can we concur in the view of appellant's counsel that the record in this case discloses no cause of action in plaintiff. The evidence is undisputed that the train was thrown from the track by the fracture of one of the steel rails while passing over it and transporting plaintiff, who was a passenger. Beyond question this made a *prima facie* case for plaintiff, which made it the duty of the court to submit the issue of negligence to the jury, despite the fact that appellant introduced evidence tending to show that the rail which broke was of standard size, properly laid, and attached to the ties; and that it had been in use less than four years, and according to the testimony of appellant, furnished indication of a fresh break, and disclosed no apparent flaw; and that it had been tested at the factory, and had been observed to be in seemingly good condition by the section foreman while walking over the track and inspecting the same on the day previous to the accident.

"This case falls strictly within the rule of *res ipsa loquitur*, which affords a presumption of negligence as against a carrier whenever an injury is occasioned to a passenger by any defect in its train of cars or railway track which would not ordinarily have occurred had

its track and train been kept in the condition of safety prescribed by the calling in which it is engaged. *Norris v. Railway*, 239 Mo. loc. cit. 715, 144 S. W. 783; *Price v. Street Railway Co.*, 220 Mo. 446, 119 S. W. 932, Am. St. Rep. 588; *Partello v. Railway*, 240 Mo. loc. cit. 137, 145 S. W. 55; *Thompson on Negligence*, vol. 3, 2809, p. 275.

“In speaking of submitting the case to the jury, where such a presumption of negligence exists, it is said by a learned text-writer: ‘The very nature of this presumption is such that it takes the question of the negligence of the defendant to the jury in all cases. It requires him to explain the accident consistently with the conclusion of due care on his part; and whether he succeeds in doing so is necessarily a question of fact for the jury. The judge cannot decide that he has done so without trying a question of fact, passing upon the credibility of witnesses, and deciding that an affirmative proposition of fact has been proved. This cannot be done in any jurisdiction where the system of trial by jury is properly understood and correctly maintained. Judges who undertake to perform this office in the place of juries usurp the office of juries and seize jurisdiction which, it may well be assumed, has not been committed to them by the Constitution or the laws of any American jurisdiction, federal or state.’ *Thompson on Negligence*, vol. 3, 2773, p. 238; * * *.” (1062.)

Brown v. La. & M. R. R. Co. (Mo.), 165 S. W., 1060.

A number of decisions are collected in the following late case, in which it said:

“In fact, it may be said that, where a passenger is suing a carrier for injuries received, proof establishing this relation, together with the facts and circumstances of the wreck of the vehicle in which he is being transported, together with proof that he received injuries because of the wreck, makes a *prima facie* case of negligence against the carrier, casting upon the carrier the onus of showing by the evidence that it has exercised the utmost care for the safety of its passengers, and that the injury was not the result of any negligence upon its part. Indeed, this rule is not disputed. It is so generally applied in this country that it needs no further citation of authority; but, admitting the rule, the contention is here made that, although the circumstances of this case, as shown, made a *prima facie* case of negligence, yet when the railway company introduced evidence tending to show proper construction and due care, that this presumption was fully and finally rebutted, and that the court should have declared, as a matter of law, that there was no liability, unless plaintiff returned to his case and made proof of specific acts of negligence. On the other hand, plaintiff insists that the presumption and inference of negligence arising from the facts shown by him are not destroyed by the mere introduction of exculpatory evidence on the part of defendant; that, when such a condition arises, it is for the jury to determine whether or not the evidence of defendant is sufficient to rebut and destroy the presumption and inference of negligence. This brings us to the precise point to be decided. (1002.)

“We think from a reading of the foregoing authorities, and upon reason, that when, as in this case, plaintiff has shown that he was a passenger upon a common carrier, and that

the train upon which he was riding at the time had been wrecked, together with the circumstances attending the wreck, and that he has suffered physical injuries as a direct result thereof, thus making for himself a *prima facie* case, based upon the presumption and inference of negligence arising from the facts proven, and this presumption is answered by evidence of defendant tending to exonerate itself from any negligence, that the question as to whether this evidence is sufficient for the purpose is, ordinarily one to be determined by the jury." (1003.)

Midland Valley R. Co. v. Hillyard (Okla.),
148 Pac., 1001.

"The plaintiff is the widow of one who was killed by an accident on a steam-boat belonging to the defendant. Her husband had purchased a ticket, and gone upon the boat as a passenger. Within a very short time, and just as the boat was fairly clear of the wharf, a violent explosion occurred, which shattered the forward part of the boat, and hurled boards and fragments of timber into the air. Mr. Spear was badly bruised and died soon after. The explosion was followed by a dense, black smoke, but no fire seems to have been communicated to the shattered boat, which was immediately removed to a yard, outside the state, for repairs. All this appeared from the evidence of the plaintiff. If the evidence had closed here, it will not be doubted that the plaintiff would have been entitled to a verdict. * * * It was the duty, of the defendant, therefore, upon proof of the happening of an accident to a passenger by an explosion upon its boat, to take up the burden of proof which the law put on it, and show that the explosion was not due to the negli-

gence of the company or its employes. This duty the defendant's counsel recognized, and addressed themselves to its performance. They proved conclusively that the explosion was not of the boiler or machinery of the boat. They gave evidence tending to show that it was not due to gunpowder or to petroleum. Several of the officers of the boat, and others who examined it after the explosion, testified that they did not know what caused the explosion, or the nature of the explosive. Some evidence was given in support of a theory that dynamite had been taken upon the boat, by some unknown person, just before it left the wharf. This was all pertinent, and tended to show that the defendants were not in fault, but it was for the jury. Its value depended upon the appearance and manner of the witnesses and the degree of credibility to which they were entitled, and it was for them to say whether it was sufficient to overcome the legal presumption." (825-826.)

Spear v. Phil. W. & B. R. Co. (Pa.), 12 Atl., 824.

"Plaintiff having rested, defendant moved for a non-suit, but without avail, whereupon it produced evidence tending to show that the night was very stormy, the wind reaching a minimum velocity of 45 miles an hour, and an extreme velocity of 56 miles, which is not extraordinary; that the lines had been in use for seven years, but were of first class material, and that the wire in question had parted about midway between poles standing 130 feet apart; that the insulation was not broken, except at the point of fracture; that it carried 1,000 volts, but where broken the voltage was much less, being estimated at from 300 to

500; that the wires and their fastenings, and the poles upon which they were carried, were regularly inspected as often as once every other day by a competent electrician; that the company was equipped with the standard and best approved ground detectors, or appliances for detecting or discovering breaks and the grounding of its wires, and that on stormy nights it applied the test every half hour; that upon this occasion the detector did not indicate the parting of the wire, and that the first notice touching its condition came through a member of the police force; that there were no indications as to how the wire came to break; that they sometimes broke of their own accord, but the cause of the present fracture was ascribed either to the crossing of the wires in a gale, or to the blowing of a limb from a tree, or something of the kind across them, causing the current to pass from one to another, thus severing one of them by burning it at the point of contact. Both parties having rested, defendant moved the court to direct a verdict in his behalf, but this was also refused; and error is assigned both as it respects the motion for a judgment of non-suit and the one to direct the verdict. (992-930.)

“This brings us naturally to the question presented by the motion to direct a verdict. When plaintiff made a *prima facie* case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case

in the end by the preponderance of the evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet the stronger and more satisfactory. The questions to be passed upon were of fact, and it was not within the province of the court, under the evidence adduced, to say to the jury, by directing a verdict, that its exoneration had been substantiated, and therefore that plaintiff's *prima facie* case had been overcome. So there was no error in finally submitting the case to the jury. *Railway Co. v. Nugent, supra.*" (931.)

Chaperon v. Portland General Electric Co.
(Or.), 67 Pac., 928.

The last mentioned case is cited with approval in—

Abrams v. Seattle, 60 Wash., 356, 367-369;
111 Pac., 168, 172.

See also:

III Thompson on Negligence (2nd Ed.),
Sec., 2770-2774;

Dusenbury v. North Hudson County Ry. Co.
(N. J.), 48 Atl., 520;

Emerson v. Butte Elec. Ry. Co. (Mont.),
129 Pac., 319, 320;

Sherman v. So. Pac. Co. (Nev.), 115 Pac.,
909, 910;

- Simone v. Rhode Island Co.* (R. I.), 66 Atl., 202, 203;
Chaffe v. Consolidated Ry. Co. (Mass.), 82 N. E., 497;
Eldridge v. Minneapolis St. L. Ry. Co. (Minn.), 20 N. W., 151;
Norfolk-So. R. Co. v. Tomlinson (Va.), 81 S. E., 89, 92;
 29 *Cyc.*, 634.

Credibility of Witnesses.

All of plaintiff in error's witnesses were employees by reason of whose acts negligence would be attributed to it if the occurrence was the result of negligence, as it bore evidence of being. For this further reason, the Court could not grant a directed verdict:

“Notwithstanding the testimony of these witnesses was so positive to the effect that they accepted the trust, we are of opinion that it was not improper to submit the question to the jury. In its charge the court instructed the jury that the creditors who accepted the deed of trust must themselves be free from the taint of fraud, and the question of fraud was so connected with that acceptance that it was possible for the jury to have found that the accepting creditors had knowledge of the fraud at the time of their acceptance. They were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses (*Lomer v. Meeker*,

25 N. Y. 361, 363; *Elwood v. Western U. Teleg. Co.*, 45 N. Y. 549, 553 (6 Am. Rep. 140), the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. *Munoz v. Wilson*, III N. Y. 295, 300; *Dean v. Metropolitan Elev. R. Co.*, 119 N. Y. 540, 550; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 200 (10 L. R. A. 676); *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 422." (495-496.)

Sonnentheil v. Christian Moerlein Brewing Co., 172, U. S., 401, 408; 43 L. Ed., 492.

The Volkmar case, the last one mentioned in the preceding quotation, is one in which the point was raised under circumstances somewhat similar to those existing in this case. The decision is reported in 31 N. E., 870, from which the following is taken:

"The evidence showed that the bolt was broken, and that in consequence the iron plate or clip fell upon the plaintiff. The structure was consequently out of repair, and under the circumstances, I think the presumption of negligence follows. (870.)

"The learned general term in its opinion admits this proposition, and concedes that the fall of the plate or clip, in the absence of an explanation, raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was

given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts, and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions, and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolt and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair and dangerous. But, even if this evidence was sufficient to remove the presumption, as held by the general term, the credibility of the witness would still be involved and be a question for the jury. This witness was the defendant's track walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was therefore a person interested, and possibly actuated by a motive to shield himself from blame." (871.)

The Volkmar case is commented upon and followed in—

Gibson v. Chi., Milwaukee, Etc., R. Co., 61 Wash. 639, 641-642; 112 Pac., 919, 923-924.

"Employees of a party, although they may not be affected by the verdict pecuniarily, are,

by the great weight of authority, to be deemed interested witnesses. This is especially true in actions against the master for the negligence of his servants. While the latter are competent witnesses for the former, their incentive to exonerate themselves from blame goes to their credit, and should be carefully considered in weighing their testimony."

30 *Am. & Eng. Encyc. of Law* (2nd Ed.), 1091.

"It is well settled that the credibility of witnesses is in all cases a question for the jury. The rule has been applied under an almost infinite variety of circumstances; as, for instance, where the witness is a party, or the relative of a party, or is interested, or a lunatic; whether the evidence of the party, or other witness, is contradicted or conflicts with testimony previously given by him, or conflicts with statements previously made by him, or is shaken on cross-examination, or whether the credibility of the witness is questioned, or his testimony given under circumstances such as would naturally throw discredit on him. So the rule applies, although the testimony of the party, or of interested witnesses, or of other witnesses is uncontradicted."

38 *Cyc.*, 1518-1521.

See also:

Missouri, K. & T. Ry. Co. v. Murphy
(Kan.), 52 Pac., 863, 864;

Lindenbaum v. N. Y., N. H. & H. R. Co.
(Mass.), 84 N. E., 129, 133;

Devine v. Murphy (Mass.), 46 N. E., 1066;

Howard v. Louisville Ry. Co. (Ky.), 105 S. W., 932, 933;

Brunswick & W. R. Co. v. Wiggins (Ga.), 39 S. E., 551, 552.

For the reason that all of plaintiff in error's witnesses were employees, as well as under the doctrine of *res ipsa loquitur*, the court properly submitted the case to the jury.

Review of Plaintiff in Error's Citations.

The decisions upon which plaintiff in error relies will be discussed in the order set out in its brief:

In the Beeman case, 79 Wash., 137; Brief, 11, the court was discussing the "presumption that the driver of a street car would not be negligent," not an inference of negligence arising from an occurrence which would not ordinarily take place in the absence of negligence.

"Presumption of a consideration" in support of a negotiable instrument was the subject under consideration in the Nicholson case, 77 Wash., 292, 298; Brief, 12.

In the Welch case, 46 Wash. Dec., 243; 153 Pac., 355, 358; Brief, 12-13, the court was discussing "the rule of evidence that a killing, unexplained, is presumed to be murder." Furthermore, the court did not hold that the defendant's showing was sufficient to warrant taking the case from the

jury. The court said that "the question for the jury was whether the *prima facie* case arising from the presumption attending the killing had been met." (359.) The court held, just as the court instructed the jury in this case, that the preponderance of the evidence must be with the plaintiff in order to recover. But there is a great deal of difference between that holding and the contention that the jury shall not pass upon the sufficiency of defendant's evidence to overcome the plaintiff's showing. The distinction between burden of proof and preponderance of evidence is not involved in this case, although that distinction made in the Welch case will serve to explain some of the other decisions which plaintiff in error relies upon to support its contention. Notwithstanding the court in that case was considering a bare presumption, and not the inference of negligence arising from evidentiary facts, and its decision would not be in point even though it had held that there was nothing to go to the jury, in so far as the case has a bearing, it is contrary to plaintiff in error's contention. The case was sent back for a new trial so that the jury could determine, under proper instructions on preponderance of evidence, whether or not the defendant's evidence met plaintiff's showing.

The Omaha St. R. R. Co. case, 105 N. W., 303; Brief, 13-14, is another case in which the court was discussing an erroneous instruction on pre-

ponderance of evidence, and in which the case was sent back for new trial so that the jury might determine the question of negligence under proper instructions. That part of the opinion quoted by plaintiff in error is not contrary to defendant in error's contention. It is said, "But when the proof of such accident *is met*," etc. That the jury is to determine when it "is met" is clearly indicated by another paragraph of the Court's opinion:

"The defendant asked the court to instruct the jury to the effect that, although they found that the car was derailed, yet if they found that, at the time and place of the accident, the car and track were in good order and condition, and without defect or imperfection, the presumption arising from the derailment of the car would be thereby overcome. It was not error to refuse this instruction because it ignores the inference of negligence in the operation of the car, which the jury might legitimately draw from the fact of derailment."

The notes following the report of that case in 4 L. R. A. N. S., 122, do not relate to this question at all; they deal with the degree of care which a carrier must exercise.

The following statement shows clearly that plaintiff in error does not grasp the nature of the rule of law under discussion: "The circumstances of some of the cases are such that the court may properly submit the cause to the jury under proper instructions." Brief, 14. If the plaintiff's show-

ing were but a bare presumption that served no purpose except to change the order of proof, no case in which the plaintiff failed to adduce evidence in rebuttal of the defendant's evidence could be properly submitted to a jury, for the apparent reason that plaintiff's showing would not create a conflict with defendant's evidence, and there is nothing for determination by a jury in the absence of a conflict in the evidence.

A further quotation from the Scarpelli case, 63 Wash., 18; 114 Pac., 870; Brief, 14-15, will give light on that decision:

“When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholly on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other non-applicable features, if he would prevent the court from holding, as a matter of law, that the presumption is overcome.

“‘The rule of law is, doubtless, that, where there is no conflict of testimony, where the existence of a fact is clearly proved by the undisputed testimony, the court should hold that the fact is established.’ Spaulding v. Chicago & N. W. R. Co., 33 Wis., 582.

“Referring to the contention of appellants that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose and should be submitted to the jury as a question of fact, it is said, in answering the same contention in the Spaulding case:

“‘The argument would probably be a sound one were this a presumption of fact. Its weight and force and consequently the amount of proof essential to overcome it, would in such case be for the jury and not for the court, to determine. But the presumption under consideration is clearly one of law and is governed by an entirely different rule. Its weight and effect, and the amount and character of the proof necessary to overcome it, are questions for the court. * * * In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but where as in this case there is no such conflict, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold as a matter of law that the presumption is overcome.’

“The same rule is announced in *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Central of Georgia R. Co. v. Waxelbaum*, 111 Ga. 812, 35 S. E. 645; *Baltimore City Pass R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Woodward v. Chicago, M. & St. P. R. Co.*, 145 Fed. 577.

“In *Peters v. Lohr* (S. D.), 124 N. W. 853, the court, in speaking of the effect and character of ‘Presumptions,’ says:

“‘A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when

the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents' *prima facie* evidence with evidence and not presumptions. A presumption is not evidence of a fact, but purely a conclusion. Elliott, Ev., Par. 91, 92, 93; Wigmore, Ev., Par. 2490, 2491.'

"Appellants not having attempted to lessen the probative force or value of respondent's testimony, either in their main case or in rebuttal, cannot make a controverted question of fact out of that over which there is no controversy, nor treat as a disputed issue of fact that over which there is no dispute. The court was therefore justified in ruling as upon a question of law." (24-25. Italics ours.)

It is apparent from the above quotation that the court fell into error by assuming that the deduction of negligence that may be drawn from facts placed in evidence—facts that of themselves cause men to associate them with negligence—is a presumption such as may be likened to "Bats flitting in the twilight, but disappearing in the sunshine of actual facts." "Presumption" is a term that is variously used and is therefore ambiguous when used as a general term. Inferences to be drawn from facts placed in evidence are very different from those rules of law which govern the order of proof, although the term "presumption" is applied to either in many cases. The distinction is noted in the following:

"It has undoubtedly been held, in several cases, that a jury may very properly presume

a servant's wages have been paid, when it appeared that the custom was to pay them at stated periods, and that a considerable time had elapsed without any claim. But presumptions are properly divided into two classes, *viz.*, presumptions of law and presumptions of fact. Presumptions of law are such as are conclusive or absolute; that is, such as are not permitted to be overcome by proof that the fact is otherwise, or such as are termed disputable presumptions; that is, such as admit of contrary proof, but which, in the absence of all opposing evidence, make a *prima facie* case, and throw the burden of proof on the other party. When presumptions of this class arise it is the duty of the court to instruct the jury that they are bound to find in favor of the presumption.

"Presumptions of fact are of an entirely different character and are in truth but mere arguments and differ from presumptions of law in this essential respect, that while those are reduced to fixed rules and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. These cases fall within the exclusive province of the jury. They are usually aided by the advice and instructions of the judge, more or less strongly urged at his discretion; but the whole matter is to be decided by themselves, according to the conviction of their own understanding." (150-151.)

Snediker v. Everingham, 27 N. J. Law, 143.

"The distinction between presumptions 'of law' and presumptions 'of fact' is in truth

the difference between things that are in reality presumptions and things that are not presumptions at all."

4 *Wigmore's Evidence*, 2491.

See also:

United States v. Sykes (N. C.), 58 Fed., 1000, 1005;

United States v. Searcey (N. C.), 26 Fed., 435;

Cook v. Dowling, 26 N. Y. Suppl., 764, 765;

Doane v. Glenn, 1 Colo., 495, 504;

Bow v. Allenstown, 34 N. H., 351; 69 Am. Dec., 489, 496;

6 *Words & Phrases*, 5537-5540.

In the Scarpelli case, the court refers with approval to a statement in the Spaulding case (chiefly relied upon as authority for the court's holding) that a contention such as defendant in error makes "would probably be a sound one were this a presumption of fact." That court and the Washington Court did not distinguish between a bare presumption or rule of law fixing the order of proof (a "presumption of law") and the deduction or inference which may be drawn from facts in evidence (sometimes inaccurately termed "presumption of fact"). The argument is based upon a false premise, and consequently the decision is unsound.

The United States Supreme Court cases, as well as the other cases where the nature of the *res ipsa*

loquitor doctrine was given due consideration, establish that it relates to facts constituting evidence, and not to a bare rule of law fixing the order of proof. Of course, United States cases are of controlling effect on questions of this nature, even though the Washington cases were entitled to consideration as precedents.

The Woodward case, 145 Fed., 577; Brief, 15-16, is not in point. The court was considering a presumption created by statute, not the common law doctrine of *res ipsa loquitor*. The court adopted the state court's construction of the statute. The state court held that the statute affected nothing but the order of proof; that is, established a rule of local practice, which is made binding upon the Federal Courts by the United States Conformity Statute.

U. S. Rev. Stat., Sec., 914;

11 *Cyc.*, 879-890.

This court is considering a rule of general law, and, consequently, the Woodward decision is inapplicable. If the court intended to announce a general rule of law, its opinion is to that extent *obiter dicta* and unsound.

The same judge that decided the Woodward case did write a dissenting opinion in the Great Northern Ry. Co. case, 115 Fed., 452; Brief, 16-22, but based his opinion on the grounds that the presumption of negligence arising from the escape

of fire from the company's premises was a rule of local practice and was of like nature as the presumption of ownership arising from the possession of property, a bare presumption of law and not an inference that may be drawn from evidentiary facts. He said:

“The presumption of negligence in the operation of a locomotive which arises from the fact that it scatters sparks or coals or sets a fire is neither more sacred nor more conclusive than the presumption of ownership, which arises from the possession of property, or the presumption of the relation of one riding in a car to a carrier which arises from his riding on its railroad in its passenger car, or from any other disputable presumption of fact; and it ought to receive no different measure of consideration. (460.)

“This rule that the presumption of negligence from the setting of a fire is, as a matter of law, overcome by the uncontradicted testimony of witnesses that due care was exercised, is a rule of evidence, a rule of practice, a rule which simply measures the force and effect of a disputable presumption of fact in the trial of fire cases in the states of South Dakota, North Dakota, Minnesota, and perhaps in other states; and in those states it ought to and does obtain in the federal courts, as well as in the state courts, because it is a just and rational rule, and because the act of congress provides that the practice, forms and modes of proceeding in actions at law in the national courts shall conform, as near as may be, to the practice, forms and modes of proceeding existing at the time in like causes in the courts of record of the state

within which the federal courts are held. Rev. St., Par. 914.” (461.)

A question of local practice is not before this court, and the United States Supreme Court has held the *res ipsa loquitur* inference of fact to be evidence which may be weighed by the jury.

In the majority opinion in the Great Northern Ry. Co. case, it is said:

“Learned counsel for the railroad company do not controvert these propositions, but they assert that the trial court should have told the jury, in substance, that the engine was properly managed, and that the company was guilty of no negligence in that respect, and that a reversible error was committed in not eliminating that issue from the case.

“We think that these propositions are untenable. The testimony introduced by the plaintiff, that his property had been destroyed by a fire kindled on the right of way of the railroad by coals, cinders, or sparks emitted by a passing locomotive, if the jury believed such to be the fact, as they must have done, cast on the defendant company the burden of overturning the presumption of negligence thus raised; that is to say, the burden of showing that the locomotive was properly handled or operated, and that due care had been exercised in the construction and equipment of the same and in keeping it in repair, so as to prevent the emission of cinders and sparks, so far as that end could be attained without impairing its efficiency. *McCullen v. Railway Co.*, 41 C. C. A. 365, 101 Fed. 66, 70. This presumption could only be overcome by testimony, and, unless we apply to this class of cases a rule different from that which is

applied in other cases, it was the province of the jury to determine the weight that should be accorded to the testimony which was introduced for that purpose, and also to determine the credibility of the witnesses who testified on that subject. * * *

“* * * We cannot well understand upon what theory the statement of persons, who were in charge of a locomotive when it occasioned a disastrous fire, that it was properly and prudently managed, etc., must be accepted by a court as conclusive, and as overturning, as a matter of law, the presumption of negligence raised by other testimony. It would seem, rather, that the triors of the fact ought, in such a case, to consider how far the interest of such witnesses—their natural desire to absolve themselves from all blame—may have colored their evidence, and how far their statements are consistent with other facts and circumstances which have been proven. If a court undertakes to weigh such evidence, and say that the witnesses are credible, and also to decide as to the effect of the proof, it plainly assumes the functions of the jury, or at least a function which is discharged by the jury in other cases.” (454-455.)

The Spaulding case, 33 Wis., 582; Brief, 22, has been discussed in connection with the Scarpelli case. The court assumed that *res ipsa loquitur* is but a “presumption of law” as distinguished from a “presumption of fact.”

In State v. Hodge, 50 N. H., 510; Brief, 23, the court was discussing the presumption of law that one in possession of stolen personal property is presumed to be the thief.

Section 2491 of Wigmore's work on evidence makes the distinction Defendant in Error is pointing out.

I Elliott on Evidence, Sec., 92; Brief, 24, is squarely against plaintiff in error's contention. The author states that "the evidential facts upon which the presumption is based * * * may take their place with the rest and operate with their own natural force as a part of the entire mass of evidence or probative matter, and thus be put into the scale and weighed with the rest. * * *". The jury is entitled to draw the inference from the facts proven, that is, give weight to the facts, under the rule as stated by the author.

What the court did in this case was to submit to the jury the facts of the derailment and injury to a passenger to be weighed as evidence of negligence, that is, gave the jury the right to infer negligence from those facts notwithstanding there were other facts in evidence from which a contrary inference might be drawn.

In the Gibson case, 58 N. E., 278; Brief, 24, the court announced the familiar rule that where the cause of an accident appears from the evidence the doctrine of *res ipsa loquitor* does not apply. That rule does not apply to this controversy for the reason that whether the cause of the accident appears from the evidence is a controverted question of fact.

It would take an unwarranted amount of space to review all of plaintiff in error's citations. What has been said will apply to the rest of them. The only authority it has cited relating to the undisputed testimony of employees, lines up with the authorities defendant in error cites on that phase of the controversy. The citations on the other point are readily distinguishable. Upon both theories, the law sustains the lower court's ruling.

Review of Evidence.

If plaintiff in error's contention that the evidence in some *res ipsa loquitur* cases is such that the court may direct a verdict were sound, its showing in this case would not make it of that class.

There is no evidence in the record suggesting a motive for anyone going upon plaintiff in error's right of way and wantonly causing the derailment of a train. It is scarcely conceivable that anyone would do such an atrocious thing. It would take a far better showing than that made—assuming that the testimony of the employees were accepted as true—to convince reasonable men that plaintiff in error's contention was based upon anything but theory and speculation. The theory is farfetched. It never became a probability under the evidence.

The most favorable view of the evidence discloses nothing but a derailment; one end of a rail

subsequently found to be out of alignment; an indentation apparently the result of the flange of a wheel coming in contact with the end of the receiving rail; spikes missing for about half a rail's length; a broken angle bar near the ends of the disjointed rails; angle bars, bolts and spikes found among the weeds at the foot of the embankment and about opposite the point where the rails were disjointed, the bolts bearing no "evidence of having been broken off"; and, the next morning a discovery of a claw bar and a track wrench on the abutment of a viaduct, a "long block" or one thousand feet distant from the derailment. (Trans., 46, 48, and 94.) That is the extent of the evidence upon which the finespun caused-by-trespassers theory is built.

The trainmaster, Hasenbalg, who claims to have found the bolts, etc., in the weeds (Trans., 45), did not arrive at the scene of the derailment until an hour after it happened, and until after the tourist and sleeping cars had been re-railed and taken away. (Trans., 44 and 47.) No witness knew how the things came to be where he found them, or what connection, if any, they had with the wreck. (Trans., 46, 48, 86 and 95.) That employees had placed them there would be far more likely than that trespassers had hidden them. That they had any connection with the derailment was not shown; it was surmised.

Another witness, Lempke, testified that he found

the bolts, wrenches, etc., although he states that Hasenbalg was with him. (Trans., 92.) The latter made no statement that he was accompanied by anyone. (Trans., 45-48.) Lempke also testified that he found a crowbar and a monkey wrench two hundred feet out in the prairie. (Trans., 93.) To the jury it no doubt looked very much as if the neighborhood had been pretty well strewn with tools and railroad equipment.

None of the witnesses were on the ground until more than half an hour had elapsed after the derailment. (Trans., 49, 52, 53, 61 and 92.) The superintendent of terminals, Rupp, testified that he saw an angle bar in between the ends of the rail (Trans., 50), but the roadmaster, Burke, testified that a piece of an angle bar was inside and another piece of it outside of the rail. (Trans., 70-71.) The special agent, Lempke, adopted Burke's version. (Trans., 92.) Hasenbalg did not notice anything between the rail ends. (Trans., 45.) The assistant superintendent of terminals, Bush, thought "the angle bar was in there" but could not remember. (Trans., 54 and 57.) The evidence does not warrant even an inference that there was an angle bar holding the ends of the rails out of contact. Whether there was an angle bar or but two pieces of bar at that point, the position may have been changed prior to the time of which the witnesses speak—long before they came, passengers were there, and the witnesses could not tell if the angle bar or pieces had been

handled. (Trans., 95.) Furthermore, it was conceded by an expert that when a train leaves the track existing conditions are greatly changed. (Trans., 78.)

Plaintiff in error laid great stress upon the impression in the end of the rail, the theory being that the flange of the forward engine wheel had made the mark, and that it indicated that the rail was out of place before the train arrived at that point, which, if true, would negative spreading of the rails by the train. The roadmaster stated that it would be hard to distinguish between marks of the engine and those made by the baggage car. (Trans., 81.) An examination of this mark on the rail discloses that if made by the flange on a car wheel, it was at an angle of twenty or more degrees from a line parallel with such rail. If made by the flange of an engine wheel, the result was that the engine was then headed at such an angle which would have caused it to have gone over the embankment (but ten feet from the track) instead of proceeding down the track and then heading in an entirely opposite direction. (Trans., 80-84.) The law of moving bodies would prevent any other result, and the force exerted by the coaches in the rear, would have increased this tendency. It is manifest, therefore, we think, that the indentation on the rail was not caused by the flanges of the engine wheels. If caused by any wheel in this train, it must have been a wheel on the tender or some coach. If this mark was made

by a car wheel back of the engine, the pulling power of the engine would have a tendency to right the truck of such car and produce exactly the result that was found following this wreck. We think this physical fact, together with the evidence, proves conclusively that this spreading of the rails, which is discussed by the witnesses, occurred after the engine had passed that point. (Trans., 80-84.)

The witness could not tell where the engine or cars left the rails. (Trans., 85.) The forward trucks of the tourist car had run upon the ties about 80 or 90 feet before that car came to a stop (Trans., 68), and the rear of the forward trucks was then directly at the point of the break in the rails. (Trans., 68, 85 and 92.) The cause of the front trucks of the tourist car leaving the track before it had reached the point where it is claimed the cause for derailment existed is unexplained. It is all a matter of conjecture. That it was a derailment is the only definite thing.

The probabilities are that employees removed the spikes, bolts, and angle bars, if they were removed by any person, and then neglected to replace them. Even though trains may have passed over that point after employees had worked upon the track, it does not necessarily alter the probabilities. The track might have withstood the strain of passing trains for a time, even though not held in place by all of the bolts and spikes ordinarily serving that purpose. The greatest strain was on the op-

posite rail. Where there is a weakness, there must come a time when it yields to the strain, but the mere fact that it has withstood the strain up to a certain time does not prove that the weakness did not exist where it later gave way. Further, it should be remembered that this train was being operated at a higher rate of speed than the other trains, which would cause a greater strain. (Trans., 59 and 97.) The break of the rails was on the inner side of the curve (Trans., 35 and 53), and bodies moving in a circle according to natural law, tend to follow the tangent. Trains are held to the curve of the track by the resistance offered by the outer rail, consequently the strain is much less on the inner rail. (Trans., 71-72.) The cause of the derailment is within the realm of uncertainty and conjecture, and it is the jury's function to consider probabilities.

The evidence relating to inspection and care on the part of the employees does not show freedom from negligence.

If the break in the rails were not made by the engine or some one of the cars, it should have been seen by the engineer or fireman. There was no obstruction or anything to prevent the engineer and fireman from observing the condition of the track as they approached this point. (Trans., 51.) The testimony shows that on a straight track the headlight would throw light upon the track for three or four blocks. (Trans., 59.) It will be re-

called that the blocks referred to by the witnesses were about one thousand feet long. This was a one degree curve, a very slight deflection from a straight line. (Trans., 60-61 and 90.) The engineer was not watching the track ahead of him, at least he saw no defect in the track. (Trans., 99-100.) A break in a ribbon of steel reflecting light from an engine ought to be readily noticed. It undoubtedly would have been noticed had it been there. The roadmaster stated that if the receiving rail was out of line as plaintiff in error would have it, the engine would jump when the flange of the front wheel came in contact with the end of the displaced rail, assuming that it was going twenty-five or thirty miles an hour. (Trans., 73.) The speed it was traveling was about thirty miles an hour. (Trans., 98.) The engineer felt no jolt or jar at the time or just before the engine left the rails. (Trans., 98.) The evidence indicates that the break was made by the train itself, but, if not, had there been a proper lookout, the break undoubtedly could have been seen by the engineer or fireman.

It was the duty of the section foreman, Hegger, to inspect and repair the tracks daily, tighten the bolts, etc., at this point. It was his duty to inspect four tracks, each being between one and a half and two miles in length. (Trans., 31-32.) An hour and a half to two hours of his time was devoted to inspecting the tracks. (Trans., 38.) He

was, therefore, inspecting four miles of track an hour, and he walked while making the inspection. (Trans., 33 and 38.) It requires considerable ability to cover four miles an hour, without taking the time necessary to inspect the rails to see if the joints were well bolted and in good condition. An ordinary man would not do it. He even took a much faster pace than four miles an hour, for as he walked down each track, he "zigzagged" from one to the other side of the track so that he could examine the bolts on the outside as well as on the inside of each joint of both lines of rails. (Trans., 40-43.) That was far too remarkable a performance to be believed by the jury. Either the witness was exaggerating the facts, or the inspection was carelessly performed. It was for the jury to pass upon the credibility of the witness, and to determine the nature of the inspection.

The roadmaster's inspection was of an equally doubtful character. He had two hundred and eighty-nine miles of track under his "jurisdiction." (Trans., 60.) His inspection was made from the rear end of a train. (Trans., 61-62.) If he examined the tracks daily, even though ten hours was his work-day, he would be passing over the tracks at thirty miles an hour without taking out time for stops. If he only covered part of the track daily, it would be questionable whether his memory could be relied upon to bring to mind what he had done the day of this derailment,

which occurred in March, 1914. Even though his statement that he was traveling at the rate of fifteen or twenty miles an hour when passing over this place were true, his statement that he could observe whether or not spikes or bolts were missing (Trans., 88) would not be entitled to very serious consideration, and especially as he was riding home from work. (Trans., 61-62.)

There is another important factor in this case. The witnesses did not reach the scene of the derailment for over half an hour after it took place. There is no evidence that conditions remained unchanged until they arrived. The engineer, who did not testify as to the conditions, was the only member of the train crew called upon to testify. The members of the crew no doubt examined the break prior to any witness who gave testimony in this case. The presumption is, had their testimony been favorable, it would have been introduced. There was a demand for the exercise of the functions of a jury.

If it would aid the court, and brevity did not forbid, other inconsistencies might be pointed out, demonstrating the soundness of the rules which denies conclusive effect to the defendant's showing in this class of cases.

The judgment of the District Court should be affirmed.

Respectfully submitted,

DANSON, WILLIAMS & DANSON,
Attorneys for Defendant in Error.